

§ 784.155 Activities performed in wholesale establishments.

The section 13(b)(4) exemption for employment in “marketing * * * storing, or distributing” the named aquatic products or byproducts, as applied to the wholesaling of fish and seafood, affords exemption to such activities as unloading the aquatic product at the establishment, icing or refrigerating the product and storing it, placing the product into boxes, and loading the boxes on trucks or other transportation facilities for shipment to retailers or other receivers. Transportation to and from the establishment is also included (*Johnson v. Johnson & Company, Inc.*, N.D. Ga., 47 F. Supp. 650). Office and clerical employees of a wholesaler who perform general office work such as posting to ledgers, sending bills and statements, preparing tax returns, and making up payrolls, are not exempt unless these activities can be shown to be functionally necessary, in the particular fact situation, to the actual conduct of the operations named in section 13(b)(4). Such activities as selling, taking, and putting up orders, recording sales, and taking cash are, however, included in employment in “marketing” or “distributing” within the exemption. Employees of a wholesaler engaged in the performance of any of the enumerated operations on fresh fish or fish products will be engaged in exempt work. However, any such operations which they perform on aquatic products which have been canned or otherwise rendered nonperishable are nonexempt in accordance with the principles stated in §§ 784.138 and 784.154.

APPLICATION OF SECTION 13(b)(4) IN
CERTAIN ESTABLISHMENTS

§ 784.156 Establishments exclusively devoted to named operations.

As noted in § 784.106 and elsewhere in the previous discussion, the section 13(b)(4) exemption depends on employment of the employee in the operations named in that section and does not apply on an establishment basis. However, the fact that an establishment is exclusively devoted to operations specified in section 13(b)(4) is, in the absence of evidence to the contrary, an

indication that the employees employed there are employed in the named operations either directly or through the performance of functions so necessary to conducting the operations that the employment should, in practical effect, be considered a part of the activity intended to be exempted. Where this is the case, it is consistent with the legislative intent to avoid segmentation and treat all employees of the establishment in the same manner (see Sen. Rep. No. 145, 87th Cong. first session, p. 33). Accordingly, where it can be demonstrated that an establishment is, during a particular workweek, devoted exclusively to the performance of the operations named in section 13(b)(4), on the forms of aquatic life there specified, any employee of the establishment who is employed there during such workweek will be considered to be employed in such operations and to come within the exemption if there are no other facts pertinent to his employment that require a particular examination of the functions which he performs in connection with the conduct of the named operations. If, however, there are any facts (for example, the employment of the same employee at the establishment or the engagement by other employees in like duties there during periods when none of the named operations are being carried on) which raise questions as to whether he is actually engaged in the exempt activities, it will be necessary to scrutinize what he is actually doing during the conduct of the operations named in section 13(b)(4) in order to determine the applicability of the exemption to him. This is necessary because an employee who would not otherwise be within the exemption such as a carpenter doing repair work during the dead season, does not become exempt as “employed in” one of the named activities merely because the establishment begins canning or processing fish.

PART 785—HOURS WORKED

Subpart A—General Considerations

Sec.

785.1 Introductory statement.

785.2 Decisions on interpretations; use of interpretations.